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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re the Marriage of FALCO, PASQUALE and  
MARIA

MARIA FALCO,

Respondent,

v.

PASQUALE FALCO,

Appellant.

F037368

(Super. Ct. No. 523360-6)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

Pasquale Falco, in pro. per., for Appellant.

Maria Falco, in pro. per., for Respondent.

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Maria and Pasquale Falco were married on November 9, 1992. The two permanently separated on December 4, 1995, after a short period of reconciliation. There are no children of the marriage. On January 29, 1996, a default judgment of dissolution was entered against Pasquale. Upon a petition by Pasquale, the judgment was set aside on November 18, 1996. After a contested hearing on issues of property division, a second judgment was entered on November 3, 2000.

The items of property in dispute included Pasquale's Kaiser Aerospace Pension, several bank accounts, the residence at 5745 West Fremont Avenue in Fresno, a business (Maria's Beauty Salon), two vehicles (a 1994 Dodge pickup truck and a 1994 Mazda), a tax refund, and numerous items of personal property including a camcorder. In addition, Pasquale challenged an early temporary spousal support order of \$200 a month, which was terminated on May 27, 1999.

The trial court divided the property as follows:

1. The Kaiser Aerospace Pension of approximately \$650 per month was determined to be primarily separate property of Pasquale, with the community entitled to a pro rata interest of 5 percent of that portion of the pension earned during the marriage. Maria was awarded one-half of the 5 percent or \$16.42 per month, with Pasquale retaining the rest as his one-half of the 5 percent community interest and 95 percent as his separate property.

2. Two of the bank accounts -- a savings and a checking account -- were determined to be community property and their balances at the date of separation were divided equally. One was determined to be Pasquale's separate property and its entire balance of approximately \$40,000 was awarded to him. One was determined to be for the business, Maria's Beauty Salon.

3. The business, Maria's Beauty Salon, was found to be community property, and its value, based on the evidence before the court, was set at \$3,000.

4. The residence at 5745 W. Fremont was determined to be separate property, although it was determined that the principal balance of the mortgage was reduced during the marriage by \$2,244.75, using community assets. Maria was awarded a \$1,122.37 credit based on her one-half of the community investment.

5. The 1994 Dodge pickup truck was determined to be Pasquale's separate property.

6. The 1994 Mazda was found to be a gift from Pasquale to Maria and thus the separate property of Maria. Evidence of this gift included testimony from Maria and her attorney, Deloise Tritt, who testified Pasquale confirmed to her that the car was a Christmas gift to Maria.

7. The personal property was allocated according to the petition, with the exception of a camcorder which was determined to be community property.

8. A tax refund of \$536 was awarded to Maria because the court found Pasquale had agreed to pay her the refund if she filed jointly with him for the year of separation.

In addition to the above distribution of property, the trial court found that Pasquale was in arrears on the prior spousal support order in the amount of \$7,000, with interest of \$1,555.98, through February 15, 2000. It also ordered Pasquale to pay to Maria her attorney fees and costs in the sum of \$10,106.30.

Pasquale filed his appeal from the judgment on January 3, 2001.

### **ISSUES PRESENTED**

Pasquale raises no recognizable issue on appeal, other than to challenge Maria's credibility. He has appeared in pro per without the benefit of legal counsel. His opening brief states that he is appealing "false allegations at the trial . . . Maria Falco lied under oath and her two witness[es]." He includes assertions that Deloise Tritt, Maria's former attorney, lied under oath when she stated Pasquale admitted the car was a gift and that witness Jack Clark had no receipts to prove a loan he claimed he made to Maria. Pasquale challenges the determination that the 1994 Mazda was a gift and asks the court to take judicial notice "on all the allegations that are on file." He also claims Maria lied about her income and that Maria used the legal system to extort money from him. He wants this court to order Maria to pay him \$75,000, \$500 a month as spousal support for life, and \$7,000 for the wedding rings because Maria "did not honor the marriage."

## DISCUSSION

We begin our discussion with an attempt to explain to these two pro per litigants the limited role of this court as an appellate court. We must presume the judgment or order of the lower court is correct, and must draw all inferences in favor of the trial court's decision. (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) The presentation of an appeal is not merely a rehash of arguments unsuccessful at trial, but instead is a careful assertion of *legal* error and resulting prejudice. (*Ibid.*) New witnesses cannot be called, new evidence cannot be presented, and new arguments cannot be made. (*Oldenkott v. American Electric, Inc.* (1971) 14 Cal.App.3d 198, 207.)

An appellate court does not redetermine the credibility of witnesses. This is a function of the trial court alone. (*Lauderdale Associates v. Department of Health Science* (1998) 67 Cal.App.4th 117, 127; *Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 170-171; *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1558-1559.) The trial court, as the trier of fact, is the sole judge of witness credibility (*Estate of Teel* (1944) 25 Cal.2d 520, 526), because only the trier of fact has the opportunity to observe and hear the witnesses. By contrast, an appellate court has nothing but the written record of the words spoken. (*People v. Jackson* (1992) 10 Cal.App.4th 13, 20-21.)

For these reasons, this court has no power to consider Pasquale's contentions that Maria and her witnesses lied concerning the nature and value of the property at issue -- specifically that the 1994 Mazda was a gift to Maria. The trial court found this evidence credible<sup>1</sup> and we cannot substitute a different conclusion in place of the trial court's.

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<sup>1</sup> Pasquale as much as admitted he told Tritt he had bought the car for Maria as a gift when he stated in open court while under oath "anybody would say 'Hey, I bought my wife a Christmas present.'" A witness' testimony is itself substantial evidence of the fact stated. (*Buckhantz v. R. G. Hamilton & Co.* (1945) 71 Cal.App.2d 777, 780.) And, there is no legal requirement that Jack Clark have "a receipt" to prove the existence of a

Because the car was found to have been a gift to Maria by Pasquale, the item became the separate property of Maria, the partner receiving the gift. “Either spouse can, by making a gift to the other, convert his separate property or interest in community property into the other spouse’s separate property. (Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 1997) ¶ 8:510, p. 8-134.1.) This is the law.

The trial court’s first responsibility was to characterize the nature of the property over which there was a dispute. Characterizing the status of property interests as either community or separate is the starting point for the resolution of marital property rights and obligations. (*Marriage of Haines* (1995) 33 Cal.App.4th 277, 291.) Once the trial court found the car was a gift to Maria, it correctly concluded the 1994 Mazda was Maria’s separate property. Any evidence Pasquale had concerning these issues should have been presented in the trial court, and this court has no power to consider any evidence not before the trial court. (*Oldenkott v. American Electric Inc.*, *supra*, 14 Cal.App.3d at p. 207.)

We also cannot honor Pasquale’s request that we consider all other allegations made in the proceedings below. We do not function, and being a neutral tribunal we obviously cannot function, as an attorney for either party by finding and making arguments for a party such as Pasquale which the party has not found and made. It is the responsibility of the appellant (Pasquale here) to point this court to specific trial court legal errors and to support each such claim of legal error with appropriate legal authority and record citations. (See *In re Marriage of Fink* (1979) 25 Cal.3d 877; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119-1120; *McGettigan v. Bay Area Rapid Transit*

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loan. His testimony that the loan was made, if believed, as it was here, is sufficient evidence the loan existed. Loan terms are no less valid because they are oral and not written. (See *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 897 [loan may consist of written, oral or implied terms]; *In re Marriage of Gagne* (1990) 225 Cal.App.3d 277 [oral premarital loan].)

*Dist.* (1997) 57 Cal.App.4th 1011, 1016, fn. 4.) Pro per litigants are held to the same standards as those represented by trained legal counsel. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975; but see *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1287 dissenting opin. J. Bedsworth.)

We believe Pasquale's discontent with the trial court's order stems from his basic misunderstanding of California law governing marriage and marital property, and his general malcontent over the failure of his marriage and the financial burden it has imposed upon him, for, in truth, the trial court decided many of the issues in Pasquale's favor. The large savings account was declared to be his separate property. The residence and Dodge pick-up truck, although both purchased during the marriage, were characterized as his separate property. Only a very small portion of his pension was deemed community property.<sup>2</sup>

Marriage anywhere is a gamble. Marriage in California, under this state's "no fault" divorce laws, is a very high stakes bet, as Pasquale apparently has learned. California's divorce laws simply do not permit the courts to save one disappointed spouse from the practical consequences of what turned out to have been a bad wager.

Also, much of Pasquale's current financial distress is a result of his own refusal to accept the court's temporary spousal support order, which was justified because of the disparate financial assets of the parties<sup>3</sup> and his refusal to pay the ordered attorney fees

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<sup>2</sup> Any part of a pension earned during the marriage belongs to the community and the community is entitled to a pro-rata interest based on the number of years earned during the marriage in comparison with the number of years earned outside the marriage. (See *Marriage of Gowan* (1997) 54 Cal.App.4th 80, 88; *In re Marriage of Judd* (1977) 68 Cal.App.3d 515, 522.)

<sup>3</sup> "The propriety of a spousal support award (whether to order it and, if so, its terms) is judged broadly by the parties' 'circumstances' in reference to the *standard of living established during their marriage* and their respective *needs and abilities to pay*." (Hogoboom and King, *supra*, ¶ 6:819, p. 6-295, citing Fam. Code, §§ 4320, 4330(a); *Marriage of Meegan* (1992) 11 Cal.App.4th 156, 161.)

and costs. Unfortunately, until Pasquale complies with the valid orders of the trial court and meets these obligations, the interest will continue to accrue and the financial difficulty Pasquale finds himself in today will only become worse. It is time for these parties to end this matter.

**DISPOSITION**

The judgment is affirmed. Each party shall bear its own appellate costs.

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Dibiaso, Acting P.J.

WE CONCUR:

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Vartabedian, J.

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Harris, J.